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IN THE

Supreme Court of the United States

PLAZA LIQUOR STORE, INC.

Petitioner

vs.

CITY OF ATLANTA

Respondent

NO. 1038

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Trial Judge of the Atlanta Judicial Circuit is reprinted as "Appendix A" hereof. The decision of the Supreme Court of Georgia, not yet printed in the official reports, is reprinted as "Appendix B" hereof.

JURISDICTION

The judicial requisites are adequately set forth in the petition.

QUESTION PRESENTED

1.

It is contended by the Respondent that the question

presented is an inaccurate question for the following reasons:

(a) The municipality has acted under no guise;

(b) Public hearings were held prior to the passage and adoption of said ordinance March 23, 1964;

(c) The municipality is authorized by Georgia Laws, 1937-1938, Extra Session, page 103 to adopt reasonable rules and regulations as may fall within the police powers of such municipality to regulate the issuing of licenses and determining the location of distilleries, wholesale businesses, or retail businesses licensed by them.

(d) The City of Atlanta has full power and authority to pass all such ordinances respecting the licensing of retail liquor stores. (Ga. L. 1874, p. 116 §15);

(e) The petitioner was not using the real estate as a retail liquor package store in view of the fact that plaintiff, in its first amendment to its original petition (paragraph 3), alleged that its retail liquor license had been revoked on September 1, 1963 and it had no license when the ordinance, "Appendix C" of the petition, was passed on March 23, 1964. In support of this statement, we cite Paragraph 3 of plaintiff's petition which reads as follows:

"3.

"On or about the 1st day of September, 1963, the Commissioner, State Revenue Department, State of Georgia, revoked the retail liquor license of PLAZA LIQUOR STORE, INC., and since that time plaintiff corporation has not been licensed to conduct a retail liquor store at 3281 Roswell Road, N.E., Atlanta, Fulton County, Georgia."

Therefore, it is contended by the Respondent that the question, as presented, is inaccurate for the above reasons and if any question be presented, it would be as follows:

> "Can a petitioner force a municipality to issue to him a license for a retail liquor store when the petitioner does not come within the provisions of reasonable rules and regulations, applying justly to all the people?"

STATUTES INVOLVED

The petition adequately sets forth the statutes involved. The ordinance in controversy is marked "Appendix C" of the petition.

STATEMENT OF THE CASE

On the 1st day of September, 1963, the Commissioner of the State Revenue Department of the State of Georgia for cause revoked the retail liquor license of the petitioner. Since September 1, 1963, therefore, the petitioner has not been licensed to conduct a retail liquor store at No. 3281 Roswell Road, N.E., Atlanta, Fulton County, Georgia. (Petitioner's first amendment to his original petition, filed in Fulton Superior Court, Atlanta, Georgia, and set forth as paragraph 3.)

Prior to March 23, 1964, a decision was rendered in the United States Court of Appeals for the Fifth Circuit, No. 2065, entitled *Mrs. Lola Hornsby, Appellant, versus Ivan Allen, Mayor of the City of Atlanta, et al, Appellees.*

On April 3, 1964, the United States Court of Appeals for the Fifth Circuit, in Case No. 2065, entitled *Mrs.*

Lola Hornsby, Appellant, versus Ivan Allen, Mayor of the City of Atlanta, et al, Appellees, denied a petition for rehearing filed for the purpose of asking for clarification of the principles involved in the former decision, which clarification is set forth in "Appendix D" of this Brief in Opposition.

Pursuant to the decision laid down in the *Hornsby case, supra,* the people of the City of Atlanta, after public hearings, adopted and approved on March 23, 1964 an ordinance entitled "An ordinance to regulate the licensing and control of retail dealers in spirituous liquors; collection of revenue therefrom; and for other purposes." ("Appendix C" of the petition.)

Said ordinance was adopted and approved specifically to obey, be consonant with and come within and under the decision rendered in the *Hornsby case, supra.*

Thereafter, on the 2nd day of July, 1964, the petitioner filed its action in Fulton Superior Court, Atlanta, Georgia against the City of Atlanta, twice amended, alleging in substance that it had previously operated Plaza Liquor Store, Inc. at No. 3281 Roswell Road, N.E., in Atlanta, Fulton County, Georgia; that the value of its real property and fixtures was falling substantially, and that its liquor store was in existence on March 23, 1964 and had been for more than six years prior to the enactment of this ordinance. (Paragraph 3 of plaintiff's first amendment to its original petition states that it had not been licensed to operate a retail liquor store since September 1, 1963). Petitioner further alleged that the City of Atlanta had interfered with the plaintiff's lawful use and occupancy of its property thereby diminishing its leasehold value; that plaintiff was deprived of due proc-

ess of law, alleging that said ordinance in question was enacted without notice or an opportunity to be heard of any kind and was contrary to the 5th and 14th Amendments to the Constitution of the United States.

The petitioner sought relief asking that Sections 1, 2, 3, 4, 37, 54 and 59 of the ordinance be declared null and void and for other relief.

Respondent filed general demurrer and motion to dismiss petitioner's complaint and the Trial Court after argument of counsel on October 7, 1964, by written order, sustained a motion to dismiss. (Marked Appendix "A" of the petition.) Thereafter, plaintiff, as provided by law, appealed the judgment of the Trial Court to the Supreme Court of Georgia, and on February 4, 1965, in a written opinion wherein all the Justices concurred, the judgment of the Trial Court was affirmed and the litigation terminated in favor of the Respondent.

ARGUMENT AND REASONS FOR DENYING THE WRIT

A. No important question of Federal Law.

This case does not present a question of importance among the several states as the decision of the Supreme Court of Georgia turns upon its own facts and it will affect only the litigant and indeed, very few, if any, others.

This statement is based upon the fact that if there is any other person desiring a retail liquor dealer's license outside the defined package store area, in said ordinance, it has not yet come to light.

B. There is no conflict of decision.

The ordinance, as adopted and approved, was so passed and adopted and actually designed to be in harmony with and compatible to the decision rendered in the case of *Mrs. Lo'a Hornsby vs. Ivan Allen, Mayor of the City of Atlanta, Et Al,* No. 326 Fed. 2d, 605, "Appendix C" of this Brief.

There is no conflict of decisions as contended by the petitioner. Actually, the Respondent presents two questions it thinks controlling in regard to the issues raised on the general demurrer as to Count One of plaintiff's petition. They are as follows:

1. Is it a valid exercise of the police power for a muncipiality to regulate the placement of retail package liquor stores?

2. If the above question be answered in the affirmative, can a municipality so regulate by a liquor ordinance when there is a comprehensive zoning statute?

COUNT ONE of the petition purports to make a constitutional attack upon the ordinance of the City of Atlanta entitled "AN ORDINANCE TO REGULATE THE LICENSING AND CONTROL OF RETAIL DEALERS IN SPIRITUOUS LIQUORS; COLLECTION OF REVENUE THEREFROM; AND FOR OTHER PURPOSES." COUNT ONE also seeks injunctive relief.

Acts 1937 - 38, Ex. Sess., pp. 103, 111 entitled "Alcoholic Liquors — Regulation and Tax" provides as follows:

> "Nothing in this Act shall be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Act. All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them."

We emphasize the language and meaning of this Code Section as it clearly states "Nothing in this Chapter shall be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Chapter." (This Chapter deals with Intoxicating Liquors.) We emphasize that the Code Section quoted above clearly and specifically states "All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them."

This grant of legislative authority is indeed clear, in addition to other grants of legislative authority to municipalities, as regards intoxicating liquors, the same being an exercise of police power.

It was held in *Owens* v. *Rutherford*, 200 Ga. 143 at 149 (1945): "Inasmuch as a license to sell spirituous liquors is neither a contract nor a property right in the licensee but a mere permit to do what would otherwise be an offense against the general law, it is, when granted

by a municipal corporation, subject at all times to *the police powers of that corporation,* and the latter, in the absence of any charter restriction upon its authority in this respect, may in the exercise of those powers revoke the license at any time."

Ison v. *Mayor & Council of Griffin*, 98 Ga. 623 (1895)

Plumb v. *Christie*, 103 Ga. 686 (1898)

Melton v. *Mayor & Aldermen of Moultrie*, 114 Ga. 462 (1901)

Phillips v. *Head*, 188 Ga. 511 (1939)

Highnote v. *Jones*, 198 Ga. 56 (1944)

The Court further held on page 149 as follows: "Nothing in this act contained shall be construed as giving any person a right to sell spirituous liquors as herein defined, but the manufacture, sale and distribution of spirituous liquors is declared to be a privilege in this State and not a right." Also, "It is perfectly clear, therefore, that the act has in no wise enlarged the status of a licensee beyond that of a mere holder of a permit which is revocable at any time without cause, as declared in the decisions above cited."

The Court further, in its opinions, stated: "Since the petitioners are engaged in a business which is only permissive, and not the exercise of a legal right, and is subject to the will of the authorities granting the permit, and under the police powers of the municipality, in the absence of any charter restriction upon its authority in this respect, the license may be revoked at any time without cause. . . ."

The Court held further and stated: "In a number of cases it has been held that the revocation of a license to sell spirituous liquors, when done under the police power of a municipality, does not deprive the licensee of his property without due process of law."

Sprayberry v. *The City of Atlanta*, 87 Ga. 120 (1890)

Cassidy v. *Mayor & Council of Macon*, 133 Ga. 689 (1909)

McKown v. *City of Atlanta*, 184 Ga. 221 (1937)

The Court also held on page 150: "Being the exercise of police power, the revocation here was not, as contended by the plaintiffs in error, violative of article 1, section 4, paragraph 1 of the Constitution of this State."

Under Acts 1937-38, Ex. Sess., pp. 103, 111 above cited, and under the holdings in the above decisions set forth, it is the contention of the City of Atlanta that there can be no room for doubt but what the ordinance as passed was done under the authority of the police powers granted to the City of Atlanta under Title 14, Article III of the Charter of the City of Atlanta of 1953, as amended.

Zoning regulations are in a different category from districting under the police powers in regards to designating areas for liquor stores. Due to the nature of liquor stores in being inherently inimical to society, different laws are applicable to the control thereof. The law is to the effect that municipalities must have express power to zone and that municipalities can district liquor areas through their general police powers. To the effect that expressed power to zone is necessary for municipalities

to pass zoning ordinances, see *City of Pearson* v. *The Glidden Company* 205, Ga. 738 (1949). To the effect that the control of liquor stores comes under the general police powers, see the above cited Georgia cases.

The City of Atlanta gains its power to place its districts into effect by ordinance through the general powers granted municipalities in the above quoted Act and its Charter powers as cited herein. It is respectfully contended that the law as to zoning is not applicable in this case and it has been so held in other jurisdictions. We have found no case where the contrary has been held.

Moore v. *McCarver,* 240 SW 2d 443 at 445 (1951) states "(The) ordinance was not intended to be and it was not in any sense a zoning ordinance within the meaning of Arts. 1011a-1011j of Vernon's Texas Civil Statutes. Since the purpose and intent of the Texas Zoning Law is entirely different from that of the Texas Liquor Control Act, the former being general and the latter special in nature and neither having any direct relation to the other, it is our opinion that the ordinance regulating the sale of beer as passed by the governing body of the City of Hearn on September 12, 1950 was and is valid and enforceable, notwithstanding the procedure outlined in Arts. 1011a-1011j of Vernon's Texas Civil Statutes."

In the case of *Primm* v. *City of Reno,* 252 P. 2d 835 at 839 (1953), it was held: "It should in any event at least be clear that the regulation of land by zoning does not *preclude* and is not *inconsistent* with independent regulatory limitation or distribution of businesses pursuant to independent statutory authority." Also, see *Ellis* v. *City of Winter Haven,* 60 So. 2d 620 at 622 (1952).

In the *Ellis case* cited above, proceedings were brought

against the City to contest its authority to adopt an ordinance prohibiting the sale of non-intoxicating beer for consumption on the premises without following the procedure prescribed in special zoning law applicable only to the City, and it was held: "City had authority under the State Beverage Act to enact the ordinance and was not required to follow the procedure of the special zoning law."

9 A.L.R. 2d 878, Section 2 holds: "It is generally recognized that traffic in intoxicating liquor bears such a substantial relation to the public health, safety, morals, and welfare as to make the restriction thereof to *designated zones or districts* a proper subject for governmental regulations under the *police power,* and regulations duly enacted for such purpose by properly authorized governmental agencies have been sustained in so far as they are reasonable and not unjustly discriminatory."

Grumbach v. *Lelande,* 154 Cal. 579; 98 P. 1059 (1908)

State ex rel. Simpson v. *Ackerly,* 69 Fla. 23; 67 So. 232 (1915).

In the case of *Garonzik* v. *State,* 50 Tex. Crim. 533, 100 SW 374 (1907) and *Andreas* v. *City of Beaumont,* 51 Tex. Civ. App. 625; 113 SW 614 (1908), it was held: "Municipal liquor zoning regulations adopted pursuant to legislative authorization have in several instances been held not to be invalid as conflicting with the provisions of state statutes relating to the sale of intoxicating liquors within municipalities."

Further, it was held in the *Garonzik case* cited above, as follows: "The designation of localities where the sale

of intoxicating liquor is inhibited is not prohibition *but regulation of the sale.*"

In *Wessington* v. *Matejka,* 34 S.D. 408; 148 NW 847 (1914), it was held: "A municipality may prohibit the sale of intoxicating liquors within a restricted zone or district thereof only by an ordinance of uniform operation."

It is contended by the City of Atlanta that the subject liquor ordinance is obviously, by a simple reading thereof, of uniform operation throughout the entire City and that the same prohibits the sale of intoxicating liquors within restricted zones or districts thereof and this particular liquor ordinance is certainly in conformity with the decisions above quoted.

It seems well established law that the mere fact that the sale of intoxicating liquor, or other traffic therein, is permitted in some zones or districts while it is prohibited in others does not of itself constitute an unconstitutional discrimination against persons residing or property located in the latter. In this connection, we cite:

Richter v. *Lightston,* 161 Cal. 260; 118 P. 790 (1911);

State ex rel. Simpson v. *Ackerly,* 69 Fla. 23; 67 So. 232 (1915);

Morrison v. *Cregier,* 138 Ill. 401; 28 NE 812 (1891);

Madison v. *Maryville,* 173 Tenn. 489 (1938).

It was held in the case of *Alexander* v. *Graves,* 173 So. 417 (1937), "The state may confer on municipalities

power to prohibit the sale of intoxicating liquor in certain areas or places."

In the case of *Alamogordo Improvement Company* v. *Prendergast,* 109 P. 2d 254; 45 N.M. 40 (1940), it was held "Such regulations may be promulgated *under the municipal police power.*"

It was held in the cases of *State ex rel. Floyd* v. *Noel,* 169 So. 549; 124 Fla. 825 (1936) and *Great Atlantic & Pacific Tea Company* v. *Mayor of Danville,* 11 NE 2d 388; 367 Ill. 310; 113 A.L.R. 1386 (1937) as follows: "Such regulations may be promulgated by virtue of specific power to regulate the sale of intoxicating liquors."

In the case of *Alexander* v. *Graves,* supra, 178 Miss. 583 (1937), it was further held: "Municipalities are of necessity vested with broad discretion in establishing prohibited areas or places."

In the case of *Tritico* v. *Texas Liquor Control Board,* 126 SW 2d 738; 133 Texas 388 (1939) it was held: "In the exercise of their power, ordinances will be sustained unless the action complained of was arbitrary, unreasonable, and a clear abuse of power."

It was held in the case of *Midwest Beverage Co.* v. *Gates,* 61 F. Supp. 688 (1945), as well as in the case of *Owens* v. *Rutherford,* supra; 36 SE 2d 309, "Authority to license may be predicated on a delegation of police powers."

In the case of *Campbell* v. *City of Thomasville,* 6 Ga. App. 212, hn. 4 (1909), it was held: "The selling of 'near beer' is a business which, from its very nature, admits of strict regulation under the police power. It stands legitimately in a different class from the business

of selling drugs, soda water, and similar liquids. Regulations may be upheld as applied to this occupation which would be arbitrary and unreasonable if there were an attempt to apply them to other businesses.

"The municipal governing body may legitimately refuse to grant a permit to sell at a place within the designated limits, where, for some special reason, it should appear that the sale in that particular place or building would be subversive of those objects which municipal government is designed to protect.

"It is a reasonable regulation that every one who engages in the selling of 'near beer' in a municipality shall give a good and solvent bond, conditioned that he will keep an orderly house, will not violate the State liquor laws, and will obey the municipal ordinances of the city, regulating the business."

In the case of *McKown* v. *Atlanta,* 184 Ga. 221; 190 SE 571 (1937), the further principle of law was held: "The business of selling at retail malt beverages in a city of this State, from its nature, admits of strict regulation under the police power, and is different from the business of selling drugs, sodas, etc."

At this point, we desire to reiterate that the position of the City of Atlanta is that it can prohibit the sale of intoxicating liquors in certain areas or places *under the police power granted to it by the State* and, further, that the sale of intoxicating beverages, from its nature, admits of strict regulation *under the police power,* as stated in the *McKown case.* Clearly the instant case is analogous with the case of *McKown* v. *Atlanta* cited above.

Obviously, under the decisions of the above cited case,

the laws pertaining to the Planning and Zoning Commission are not applicable as liquor falls into a different classification from its very nature and admits of strict regulation under the police power.

What may or might be the size of buildings, the types of buildings, the kinds of dwellings, whether or not a filling station can be placed next door to a $100,000 home on Paces Ferry Road are entirely different zoning matters as contrasted with regulations dealing with liquor. The cases cited clearly spell out the rights and powers under which the City properly acted.

The City's position is to the effect that it has Charter police power and, in addition thereto, statutory power applicable to all cities to regulate the places where liquor stores shall exist. It is contended that the location of these stores by districts is not the form of zoning that is contemplated by the general law of zoning. There is no Georgia case to the contrary. The above cases of *Moore* v. *McCarver, Primm* v. *City of Reno, Ellis* v. *City of Winter Haven,* supra, involve like powers and in each instance it was held such districting was not the zoning contemplated by the zoning laws of those states, which were comparable to the zoning laws of Georgia, in requiring certain acts to be done before the zoning became law.

The Defendant submits the following question as being the primary issue raised on the general demurrer as to Count Two of the Plaintiff's petition:

> Can the non-conforming use portion of the ordinance (Section 53) be implemented where the petition affirmatively shows that the petitioner had no

legal right to operate a retail package store as a result of State revocation of the license?

COUNT TWO of the petition seeks to have Section 53 of said described liquor ordinance implemented to the extent that the plaintiff's store will qualify as a non-conforming use.

It is contended that the Court in the construction of the general demurrer must consider the all important fact that the State Revenue Commissioner of the State of Georgia revoked the retail liquor license of Plaza Liquor Store, Inc. on September 23, 1963.

Dealing with Count Two of the plaintiff's petition, specific reference is made to Section 53 of the ordinance in question which is quoted as follows:

> "Where retail liquor store exists on the effective date of this ordinance in an area outside of a package store area, the same may be continued as a non-conforming use of such area; provided, however, that no such non-conforming use shall in any way be expanded or extended either on the same or adjoining property. If such non-conforming use of such an area or any portion thereof is *discontinued or changed*, it will revert back to its zoning class and shall not be a package liquor area." (Emphasis supplied.)

As pointed out under the pleadings set forth in this case, the State liquor license was revoked on September 23, 1963.

It is the basic contention of the City of Atlanta that it is impossible to have a "retail liquor store" without a license holder. The license having been revoked, the use

is discontinued, and quite clearly so, as the same has reverted. The following language was used in the case of *Home Insurance Company of New York* v. *City Council of Augusta,* 50 Ga. 530 at 537 (1874): "A license is a right granted by some competent authority to do an act which, without such license, would be illegal." Therefore, a license is the only method by which a certain otherwise illegal function might be performed. *Raines* v. *The State,* 96 Ga. App. 727 (1957).

It is the City of Atlanta's position that logically it must follow that after the plaintiff's license was revoked, it had no "retail liquor store" because it was physically and legally unable to offer retail liquor for sale to the general public. Not being able to sell liquor to the general public left no non-conforming store. It was discontinued. At best, all that the plaintiff had was a commercial building.

The value of a liquor store is different from the value of other types of businesses. The value of a liquor store is a license to operate. Title 58 of the Georgia Code, as to Intoxicating Liquors, refers to the word "license." In most of the Code Section thereunder, it is required that a license be displayed prominently at all times, that the license fees be paid in advance, that no business license under this Chapter shall be granted to places too close to schools or churches, and that licenses which may be issued under the authority of this Chapter shall be as set forth in Acts 1937 - 38, Ex. Sess., pp. 103, 110, 111, and it is required that a municipal or county license has to be exhibited before a license shall be granted by the Revenue Commissioner. There is no liquor business without an appropriate license. (We re-emphasize the

fact that petitioner's license was revoked, as pled in his petition.)

We also wish to call to the Court's attention, the case of *Troutman* v. *Aiken,* 213 Ga. 55 at 56 (1957) wherein it was held: "Where, as here, a rezoning ordinance provides 'any nonconforming use of land existing on the effective date of this resolution may be continued provided, however, that no such nonconforming use of land shall in any way be extended, either on the same or adjoining property,' it is incumbent upon one seeking to use the property for a non-conforming use after the rezoning ordinance to show that his prior use of the property was legal and not unlawful." *(62 C.J.S. 497 at 226* and *117 A.L.R. 1140.)*

C. The decision is clearly correct.

Clearly, as the Court below observed: "The allegations of Count One do not show that the plaintiff was denied due process."

"Since this Count did not state a cause of action for any of the relief sought, the general demurrer addressed to it was properly sustained."

Further, as the Court below observed: "Count Two is based on the plaintiff's contention that the use of its premises for retail liquor sales should be permitted to continue as a non-conforming use under the ordinance. However, the plaintiff failed to qualify for this use. It alleged that in September, 1963, the State Revenue Commissioner revoked its retail liquor license and that 'since that time plaintiff corporation had not been licensed to conduct a retail liquor store' on its premises.

"Since it had no license, and thus could not make sales

to the public, the plaintiff was not an existing retail liquor store on the effective date of the ordinance and therefore does not come within the terms of Section 53 as to permissible non-conforming use."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY L. BOWDEN
1103 Citizens & Southern Bank Building
Atlanta, Georgia 30303

MARTIN MCFARLAND
808 William-Oliver Building
Atlanta, Georgia 30303

LEWIS R. SLATON
1114 William-Oliver Building
Atlanta, Georgia 30303

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the United States Supreme Court, hereby certifies that a copy of the within Brief for Respondent in Opposition was served upon Mr. Robert L. Mitchell, Attorney of record for Plaza Liquor Store, Inc., by depositing a copy of same in the United States Mail, properly franked to his address of record, 701 William-Oliver Building, Atlanta, Georgia 30303.

This 23 day of April, 1965.

Martin McFarland

MARTIN MCFARLAND, Attorney

"APPENDIX A"

PLAZA LIQUOR STORE, INC.

V.

CITY OF ATLANTA

CASE NO. B-6638

FULTON SUPERIOR COURT

ORDER

The defendant's general demurrer as renewed to Counts one and two of the plaintiff's petition as amended by plaintiff's first and second amendment having come on before this Court for a hearing and argument and briefs of attorneys for both parties having been heard thereon and considered, it is hereby ORDERED and ADJUDGED that said general demurrers as renewed to Counts one and two be and the same are hereby sustained and the plaintiff's said petition as amended is hereby dismissed.

This October 27, 1964.

JEPTHA C. TANKSLEY,

Judge, Superior Court

Atlanta Judicial Circuit

"APPENDIX B"

706

Decided: Feb. 4, 1965

In the Supreme Court of Georgia

22778. PLAZA LIQUOR STORE, INC. v. CITY OF ATLANTA.

1. Count 1 failed to allege a cause of action against interference with the use of plaintiff's premises as a retail liquor store since the ordinance under which the city acted was authorized by the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors (Ga. L. 1937-38, Ex. Sess., p. 103) and by the city's charter police power (Ga. L. 1874, p. 116).

2. Count 2 did not state a cause of action for the continued use of plaintiff's premises as a retail liquor store under section 53 of such ordinance because the plaintiff was not an existing retail liquor store on the effective date of the ordinance so as to come within that section.

GRICE, Justice. The petition of a corporate liquor store, seeking to enjoin a city from interfering with the use of its property for liquor store purposes was held subject to the city's general demurrers and was dismissed, thus bringing about this review. Plaza Liquor Store, Inc., filed such petition against the City of Atlanta in the Superior Court of Fulton County.

Count 1, insofar as material here, made the following allegations. The plaintiff owns real estate which has been zoned and used for the past six years as a retail liquor store. The defendant city in March 1964 enacted an or-

dinance, copy attached, purporting to zone certain real estate as "Package Store Areas," which, under such ordinance, are the only places where retail liquors may be sold. Although the plaintiff existed on the effective date of the ordinance and met all criteria established thereby, it was not included in the package store areas provided by the ordinance. Also, the city refuses to treat the plaintiff as a non-conforming use under such ordinance and will not permit it to sell or lease its premises for the sale of retail liquors because it was not included in such package store areas. The city, by its enactment and interpretation of said ordinance, is interfering with plaintiff's use of its property and is diminishing its value in specified amounts.

The plaintiff has suffered and will continue to suffer irreparable injury unless the city is enjoined and unless designated sections of the ordinances are declared null and void. The city enacted such ordinance without providing the plaintiff any notice or opportunity to be heard, in violation of the due process clauses of the State and Federal Constitutions and without complying with the requirements of two State zoning statutes (Ga. L. 1946, p. 191; Ga. L. 1957, p. 420). The city, by enacting this ordinance, is attempting to zone and alter the use of plaintiff's premises without authority of law.

The prayers included injunctive relief against the illegal zoning of plaintiff's property so as to prohibit the retail sale of liquors thereon and against interference with plaintiff's right to lease its premises for such purpose; declaration that specified provisions of the ordinance are null and void; and restoration of plaintiff's property to its prior zoning status.

Count 2 adopted the allegations of count 1 as to plaintiff's property, the city's enactment of the 1964 ordinance, the omission of plaintiff from the package store areas of such ordinance, the city's refusal to treat plaintiff as a non-conforming use or to allow it to sell or lease its premises for liquor store purposes, the city's continued interference with plaintiff's use of its own property, the diminishing value of its property due to such interference and the need for injunctive relief. In addition, count 2 alleged that the use of the plaintiff's property for retail liquor sales should be permitted to continue as a non-conforming use under such ordinance, but the city arbitrarily and illegally refuses to do so; and that in September 1963 the State Revenue Commissioner revoked the plaintiff's retail liquor license and since that time the plaintiff has not been licensed to conduct a retail liquor store on its premises. The prayers of this count included injunctive relief against the city's interference with the sale or lease of the plaintiff's property for use as a retail liquor store.

1. As we construe it, count 1 asserts that the ordinance, particularly sections 1, 2, 3, 4, 37, 53, 54 and 59, is void because the city failed to comply with the requirements of two State statutes pertaining to the zoning of property (Ga. L. 1946, p. 191; Ga. L. 1957, p. 420). However, zoning statutes are not applicable here.

What is applicable is the authority given the municipalities of this state to regulate the retail sale of liquor within their boundaries.

The Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors (Ga. L. 1937-38, Ex. Sess., p. 103) provides as follows: "Nothing in this Act shall

be construed as preventing any municipality or county from adopting all reasonable rules and regulations as may fall within the police powers of such municipalities or counties to regulate any business provided for in this Act. All municipal and county authorities issuing licenses shall within their respective jurisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them." § 9(c), p. 111; *Code Ann.* § 58-1028.

The charter of the City of Atlanta gives the city "full power and authority to pass all by-laws and ordinances respecting . . . and every other by-law, regulation and ordinance that may seem to them proper for the security, for the peace, health, order and good government of said city." Ga. L. 1874, pp. 116, 119, § 15.

It was in accordance with this authority, granted the city in its charter and reaffirmed by the Revenue Tax Act, that the City of Atlanta enacted the 1964 ordinance, entitled "An ordinance to regulate the licensing and control of retail dealers in spirituous liquors; collection of revenues therefrom; and for other purposes."

This ordinance is not invalid for any reason assigned. Each provision is germane to and in furtherance of the regulation of the liquor business and the determination of the location of retail liquor stores within the city. As to the sections specifically attacked, section 1 states as the purposes of the ordinance the regulation and control of the licensing and sale of spirituous liquors so as to promote the health and general welfare of the community; sections 2, 3, 4 and 37 restrict licensing to the package store areas established thereby or subsequently changed and provide the procedure for such change; sec-

tion 53 permits the continuance of existing stores outside the package store areas as a non-conforming use; section 54 restricts the granting of licenses in the package store areas to those locations zoned as commercial or industrial under the zoning laws of the city; and section 59 prohibits successive license applications except those emanating from package store areas.

The allegations of this count do not show that the plaintiff was denied due process.

Since this count did not state a cause of action for any of the relief sought, the general demurrer addressed to it was properly sustained.

2. Count 2 is based upon the plaintiff's contention that the use of its premises for retail liquor sales should be permitted to continue as a non-conforming use under the ordinance.

It bases this claim upon section 53, which provides that "Where [a] retail liquor store exists on the effective date of this ordinance [March 23, 1964] in an area outside of a package store area, the same may be continued as a non-conforming use of such an area . . ."

However, the plaintiff failed to qualify for this use. It alleged that in September 1963 the State Revenue Commissioner *revoked* its retail liquor license and that "since that time plaintiff corporation has not been licensed to conduct a retail liquor store . . ." on its premises. Since it had no license, and thus could not make sales to the public, the plaintiff was not an existing retail liquor store on the effective date of the ordinance and therefore does not come within the terms of section 53 as to permissible non-conforming use. Compare *Troutman* v. *Aiken*, 213 Ga. 55, 56 (96 SE 2d 585).

The trial court properly sustained the general demurrer to this count.

Since the dismissal of the petition upon these demurrers was correct, the judgment is

Affirmed. All the Justices concur.

"APPENDIX C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20656

MRS. LOLA HORNSBY,
Appellant,

versus

IVAN ALLEN, Mayor of the City of Atlanta, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(January 7, 1964.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, JR., District Judge.

TUTTLE, Chief Judge: Appellant Mrs. Hornsby is an unsuccessful applicant for a license to operate a retail liquor store in Atlanta, Georgia. She brings this action under 28 U.S.C. §1343[1] to redress an alleged deprivation

[1] § 1343 "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

of civil rights and under 28 U.S.C. §2201 to obtain a declaration of her rights. The Mayor, the City Clerk, and the Aldermen of Atlanta are defendants. In her complaint, Mrs. Horrsby alleges that although she met all the requirements and qualifications, as to moral character of the applicant and proposed location of the store, prescribed for the holder of a retail liquor dealer's license, her application was denied "without a reason therefor" by the Mayor and Board of Aldermen. This action is characterized as "arbitrary, unreasonable, unjust, capricious, discriminatory" and in contravention of the due process and equal protection clauses of the 14th Amendment. The complaint also charges that a system of ward courtesy was followed in the issuance of liquor licenses; under this system licenses allegedly would be granted only upon the approval of one or both of the aldermen of the ward in which the store was to be located. This too is said to constitute a violation of the 14th Amendment.

The defendants' motion to dismiss was granted by the court below on the ground that the complaint only concerned a political question which was not covered by the due process provisions of the 14th Amendment, since dealing solely with motives of a legislative body in voting upon legislation, and which did not draw into question the equal protection clause, since there was no allegation of discrimination. The court indicated that the issuance of a liquor license was within the discretion of the Mayor and the Board of Aldermen and concluded that a federal court had no jurisdiction to entertain an attack on that process.

At the outset, we note our disagreement with the dis-

trict court's classification of the challenged actions as purely those of a legislative body; we do not conceive the denial of an application for a license to be an act of legislation. Although there is disagreement on the matter, see 73 C.J.S., Public Administrative Bodies and Procedures, § 71, at 398, we prefer the view that licensing proper is an adjudicative process. Thus when a municipal or other governmental body grants a license it is an adjudication that the applicant has satisfactorily complied with the prescribed standards for the award of that license. Similarly, the denial of a license is based on an adjudication that the applicant has not satisfied those qualifications and requirements. On the other hand, the prescription of standards which must be met to obtain a license is legislation, since these standards are authoritative guides for future conduct derived from an assessment of the needs of the community. (A governmental agency entrusted with the licensing power therefore functions as a legislature when it prescribes these standards, but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them.)

Since licensing consists in the determination of factual issues and the application of legal criteria to them — a judicial act — the fundamental requirements of due process are applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see *Tadano* v. *Manney*, 169 F. 2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing, see *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (1941). Although strict adherence to the common-law rules of evidence at the

hearing is not required, see *Crowell* v. *Benson,* 285 U. S. 22, 48 (1932), the parties must generally be allowed an opportunity to know the claims of the opposing party, *Morgan* v. *United States,* 304 U. S. 1 (1938), to present evidence to support their contentions, see *id.* at 18, and to cross-examine witnesses for the other side, *Reilly* v. *Pinkus,* 338 U. S. 269 (1949). Thus it is not proper to admit *ex parte* evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party. *Southern Stevedoring Co.* v. *Voris,* 190 F. 2d 275 (5th Cir. 1951); see *Chin Quong Mew* v. *Tillinghast,* 30 F. 2d 684 (1st Cir. 1929). A *fortiori,* the deciding authority may not base its decision on evidence which has not been specifically brought before it, *United States* v. *Abilene & So. Ry.,* 265 U. S. 274 (1924); the findings must conform to the evidence adduced at the hearing, *Tadano* v. *Manney,* 160 F. 2d 665 (9th Cir. 1947). Furthermore, the Supreme Court has said that an administrative order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . . There must be a responsible finding." *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943). Thus where the Secretary of State indicated that passport regulations precluded the issuance of a passport to the applicant in question, but did not specify the applicable subsection or set out the findings on which the conclusion was based, it was held that factual findings would be required before the Secretary could deny the application. *Boudin* v. *Dulles,* 235 F. 2d 532 (D.C. Cir. 1956).

(Also, the Supreme Court has held that the arbitrary refusal to grant a license or permit to one group when other groups have obtained permits under similar cir-

cumstances constitutes a denial of equal protection of the law.) *Niemotko* v. *Maryland,* 340 U. S. 268 (1951) (alternative holding). Although this case raised the problem of freedom of religion, state action and hence, necessarily, the 14th Amendment were involved. The Court concluded that a "completely arbitrary and discriminatory refusal to grant" park permits sought by Jehovah's Witnesses constituted a denial of equal protection of the law where other religious organizations had customarily been allowed to use the park.

(The appellees here, however, seek to place liquor in a special category, and argue that since Georgia has declared a license to sell spirituous liquor to be a privilege, the licensing authority has an unreviewable discretion to grant or deny licenses. It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power, see *Midwest Beverage Co.* v. *Gates,* 61 F. Supp. 688, 690 (N.D. Ind. 1945), but this is something quite different from a right to act arbitrarily and capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion.) There is no suggestion here that Georgia has sought to declare the sale of retail liquor to be a public business which can be franchised by the state and treated as devoted to a public use, as the State of Oklahoma did with cotton ginning, see *Frost* v. *Corporation Commission,* 278 U. S. 515 (1929), and the State of Utah did with mining, see *Strickley* v. *Highland Bay Mining Co.,* 200 U. S. 527 (1906). (To the contrary, the State of Georgia has limited municipalities in the exercise of their authority over liquor businesses to those

reasonable rules and regulations which fall within their police powers.)

Next, we note that states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment. Section 2 of that Amendment deals with the transportation or importation of liquors into a state or territory. Thus, although a state may, under the 21st Amendment, discriminate against imports of intoxicating beverages, see *State Bd. of Equalization* v. *Young's Mkt. Co.*, 299 U. S. 59 (1936), the Amendment does not confer any other powers, see *Sancho* v. *Corona Brewing Corp.*, 89 F. 2d 479 (1st Cir. 1937). "[T]he Twenty-First Amendment did not clothe the State's right to control the sale of liquor with any higher degree than it had over the sale of other commodities within the State." *Brown* v. *Jatros*, 55 F. Supp. 542, 544 (E.D. Mich. 1944).

Neither is the assertion that liquor may be a menace to public health and welfare a sufficient answer to Mrs. Hornsby's allegations. The potential social undesirability of the product may warrant absolutely prohibiting it, or, as the Aldermanic Board has done to some extent here, imposing restrictions to protect the community from its harmful influences. But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards. Indeed, the great social interest in the liquor industry makes an exceptionally strong case for adherence to proper procedures and access to judicial review in licensing the retail sale of liquor. The possibility of high profits on the one hand and the danger of strict governmental limitations on the other hand cre-

ate a fertile breeding ground for the temptations of graft, corruption, and other abuses of governmental office. (If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured, but the injury to the public is much greater. The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.) See *Francis* v. *Fitzpatrick*, 129 Conn. 619, 30 A. 2d 552; *Glicker* v. *Michigan Liquor Control Commission*, 6 Cir., 160 F. 2d 96.

The closest case on point we have discovered is *Glicker v. Michigan Liquor Control Commission, supra.* There an action was brought under the Civil Rights Act for an order requiring the state liquor commission to renew a license which had allegedly been revoked as an intentional and deliberate discrimination motivated by political considerations. The trial court dismissed the complaint for failure to state a cause of action, but the Court of Appeals for the Sixth Circuit reversed, holding that a valid claim was stated under the equal protection clause and the substantive provisions of the Civil Rights Act, 42 U.S.C.A. 1983. (We see no valid distinction between the revocation of a license, as in *Glicker*, and the denial of an application, as in the case at hand. An applicant for a license has the right to be treated in the same manner as prior, successful applicants are.) See *Niemotko* v. *Maryland, supra.* Compare *Ashbacker Radio Corp.* v. *FCC*, 326 U. S. 327 (1945).

(We find in this case that Mrs. Hornsby's allegations, if borne out by the evidence, are sufficient to show a violation of her 14th Amendment rights. If her application actually was denied because the delegation from her ward decided, from their own knowledge of the circumstances, that Mrs. Hornsby should not be issued a liquor license, then she was deprived of the hearing which due process requires, since she could not discover the claims of those opposing her and subject their evidence to cross-examination. In addition, Mrs. Hornsby was not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license. Next, the alleged failure of the board to reveal the basis for denying her application would, if true, be a denial of her right to have the board make findings based on the evidence adduced at a hearing. Moreover, appellees themselves indicate that the mandates of equal protection were not observed in the awarding of liquor licenses: "[I]n granting a mere privilege, appellant cites no authority which would prevent the defendants [appellees] from arbitrarily accepting one eligible application while denying others; otherwise they would, of necessity, be forced to grant licenses to every eligible citizen upon application." Brief for Appellees, p. 7. If there are too many qualified applicants, then the proper remedy is for the Board of Aldermen to adopt reasonable rules and regulations which will raise the standards of eligibility or fix limits on the number of licenses which may be issued in an area; the solution is not to make arbitrary selections among those qualified.)

Merely showing a violation of a constitutional right is, however, not sufficient to gain access to the federal

courts; since Mrs. Hornsby has not sought to invoke jurisdiction under the federal question provision, 28 U.S.C.A. § 1331, we must determine whether she has alleged an actionable claim under the Civil Rights Act, Revised Stats. § 1979, 42 U.S.C.A. § 1983, within the jurisdiction of the district court, 28 U.S.C.A. § 1343 (3). The coverage of the Civil Rights Act has long been the subject of heated controversy. Courts have been reluctant to allow what they consider simple state actions for false imprisonment and assault and battery to be brought in the federal courts as civil rights actions. See *Monroe* v. *Pape,* 365 U. S. 167, 240 n. 68 (1961) (opinion of Frankfurter, J.). Also, they have been very strict in requiring that a complaint set forth *facts* showing a denial of the protected rights and not merely "factually unsupported characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights." See *McGuire* v. *Todd,* 198 F. 2d 60 (5th Cir.), *cert. denied,* 344 U. S. 835 (1952). Furthermore, at one time various limitations were propounded on the specific rights protected by the statutes — see *Agnew* v. *City of Compton,* 239 F. 2d 226, 231 (9th Cir. 1956), *cert. denied,* 353 U. S. 959 (1957) (due process apparently not protected absent allegation of discrimination between persons); *Ortega* v. *Ragen,* 216 F. 2d 561 (7th Cir. 1954), *cert. denied,* 349 U. S. 940 (1955) (no action allowed for denial of equal protection — on the degree of state action required — see *Screws* v. *United States,* 325 U. S. 91, 142 (1945) (dissenting opinion) (civil rights statutes inapplicable where act a violation of state law) — and on the types of discrimination covered — see *Snowden* v. *Hughes,* 321 U. S. 1 (1944) (intentional or purposeful

discrimination required in equal protection case); *Deloach* v. *Rogers*, 268 F. 2d 928 (5th Cir. 1959) (only discrimination based on class or race actionable).

The trend of the recent cases, however, has been to accept more and more actions under the civil rights statutes. Thus suits have been allowed for damages for intimidating a prisoner and interfering with his right to counsel, *Lewis* v. *Brautigam*, 227 F. 2d 124 (5th Cir. 1955); for damages resulting from an illegal search and seizure and police brutality, *Geach* v. *Moynahan*, 207 F. 2d 714 (7th Cir. 1953), *Davis* v. *Turner*, 197 F. 2d 847 (5th Cir. 1952); for an injunction against enforcement of ordinances regulating the operation of taxicabs, *Walton* v. *City of Atlanta*, 181 F. 2d 693 (5th Cir.), *cert. denied*, 340 U. S. 823 (1950) (judgment for defendants on merits); and for damages to one barred from Las Vegas casinos as an undesirable character, *Marshall* v. *Sawyer*, 301 F. 2d 639 (9th Cir. 1962). The Supreme Court, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), gave the ultimate seal of approval to a construction of section 1983 not requiring an allegation of a purpose to discriminate. See *Cohen* v. *Norris*, 300 F. 2d 24, 29-30 (9th Cir. 1962) (overruling *Agnew* v. *City of Compton*, *supra*, and other cases). *Monroe* v. *Pape* upheld a complaint alleging damages from an illegal search and seizure under color of state and municipal statutes, customs and usages but not with any specific intent. *Accord*, *Egan* v. *City of Aurora*, 365 U. S. 514 (1961). It is, therefore, now recognized that no specific intent to deprive a plaintiff of his civil rights need be alleged, see *Stringer* v. *Dilger*, 313 F. 2d 536, 540 (10th Cir. 1963), and that an intentional and purposeful discrimination is necessary only under the act's criminal sections, see *Monroe* v. *Pape*,

supra at 187, or under the conspiracy provisions, see *Lewis* v. *Brautigam, supra* at 127-28.

Moreover, the case of *Baker* v. *Carr,* 369 U. S. 186 (1962), may have relaxed the requirements announced in *Snowden* v. *Hughes, supra,* for equal protection cases. Jurisdiction in *Baker* v. *Carr,* rested in part on section 1343 (3), and the Court expressly upheld jurisdiction. But the gist of the complaint was merely a denial of equal protection through gradual shifts in population, although it was alleged that the original 1901 apportionment was arbitrary and capricious. Hence it is at least doubtful that an allegation of an intentional and purposeful discrimination is necessary to sustain civil rights jurisdiction, even where founded on a denial of equal protection.

Judging Mrs. Hornsby's complaint in the light of the requirements that it set forth (1) that plaintiff has been denied a protected right, privilege or immunity, and (2) that defendants acted under color of a state or local law, see *Stringer* v. *Dilger, supra* at 540, *Marshall* v. *Sawyer, supra* at 646, we find she has set forth an actionable claim within the jurisdiction of the district court. (We have already concluded that Mrs. Hornsby alleged denial of her 14th Amendment rights. That this was done under the color of state law is too plain to merit extended discussion. Mrs. Hornsby was denied a liquor license by the Board of Aldermen, acting under the authority of the Ga. Code Ann. §§ 58-1031-103, to pass on the fitness of applicants and issue licenses. Moreover, the Board of Aldermen, functioning as an agency of the state under Ga. Code Ann. § 58-1028, had the right to adopt rules and regulations for liquor businesses, and to determine the location of retail stores.)

The proper question to be determined upon the hearing of this case in the district court is not whether the plaintiff below is entitled under the law to a liquor license. The determination of whether she should be granted one is a function of the Aldermanic Board. The role of the courts is to ascertain whether the manner in which this determination was or is made accords with constitutional standards of due process and equal protection. We are of the opinion that the complaint alleged sufficient facts to show that the denial of appellant's application for a license did not meet these standards and, since done under color of state statute, constituted a violation of 42 U.S.C. § 1983.

It follows that the trial court must entertain the suit and determine the truth of the allegations. (If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided in the liquor store licensing field.)

The judgment is REVERSED.

JONES, Circuit Judge, dissenting:

With some of the Court's opinion I am in disagreement. Some of the Court's opinion I do not understand.

The Court's opinion, as I read it, decides that the refusal to give Mrs. Hornsby a liquor license is not legislative, but adjudicative and therefore judicial. These statements are not essential to the decision and may be misleading in the consideration of some future case.

I see no necessity of extending federal civil rights jurisdiction to the review of state administrative decisions where it is asserted that irreparable injury has resulted from arbitrary action of a state administrative agency in violation of due process and declaratory and injunctive relief is sought. In such cases federal jurisdiction seems to be established without any civil rights controversy. 3 Davis, Administrative Law Treatise 310 et seq. § 23.05.

The Court directs the district court upon finding that the allegations of the complaint are true, to "enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided." This is not a class action, and if the Court is going to prescribe the remedy that the district court shall grant, might it not be just as well to confine the relief to the appellant who seems to be the only person now complaining?

It is not clear to me why the Court does not direct the district court, if it must give directions, to enjoin the issuance or renewal of licenses until standards are established and procedures provided. This sort of a directive would, so I think, be better than the one which the Court has adopted. (The order directed by the Court will, I fear, open the door to a flood of applications for licenses, none of which the appellees, under this decision, will be permitted to deny.)

"APPENDIX D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20656

MRS. LOLA HORNSBY,

Appellant,

versus

IVAN ALLEN, Mayor of the City of Atlanta, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(April 3, 1964.)

ON MOTION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

PER CURIAM: Appellees have filed a petition for rehearing in which they challenge our original holding and seek clarification of the principles involved.

As to the first contention the cases cited by appellees

to support the broad discretionary powers of liquor licensing authorities all stand for the proposition that local governmental bodies have great latitude in enacting reasonable standards and qualifications for those in the liquor business or seeking to engage in it. They do not say that the licensing authority can select those who are to receive licenses on the basis of uncontrolled discretion and whim, nor do they say that licensees can be selected without any established standards or in disregard of established standards. Thus, the cited case of *Thurlow* v. *Massachuseits,* 46 U. S. (5 How.) 504. involved the conviction of one who had sold liquor without a license. The appellant challenged the state statute which required a license to sell imported liquors in quantities less than 28 gallons. The statute was upheld and the conviction affirmed. It can be readily seen that the discretion upheld there was in the general limitation on the right to sell liquor; Thurlow was subjected to the same restrictions as all others in the state.

Furthermore, we cannot agree with appellees' contention that a liquor applicant is like a candidate for a state governmental office who has no rights secured by the United States Constitution. The liquor business is like any other business in that the state is limited in its regulation of it by due process and equal protection requirements although the peculiar nature of the business warrants the imposition of severe limitations on liquor traffic and tight restrictions on those persons engaged in it. In answer to appellees' suggestion that some rights, such as the right to practice law in a state court, are privileges not protected by the Constitution, we call attention to *Konigsberg* v. *State Bar,* 353 U. S. 252 (1957).

To deal with the requests for clarification next, we reiterate that the function of the trial court will not be to determine whether Mrs. Hornsby is entitled under the law to a liquor license; rather it is to ascertain if the manner in which it is determined whether she should be granted one accords with constitutional standards. This Court will not suggest how the determination should be made other than to point out that every applicant should be apprised of the qualifications necessary to obtain a license and should be afforded a reasonable opportunity to show that he does or does not meet them. If appellees fear that too many applicants are qualified under existing standards, then, we repeat, they may raise the standards of eligibility and fix limits on the number of licenses to be issued. If there are more applicants than licenses and all applicants are equally qualified to serve the general welfare, perhaps an unlikely event, then selection among them by lot or on the basis of the chronological order of application would meet constitutional requirements.

The motion for rehearing is DENIED.

JONES, Circuit Judge, I dissent.